United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1214

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RONALD ROBINSON,

Defendant-Appellant.

Docket No. 76-1214

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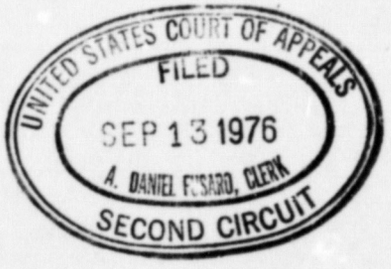
P/S

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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I

APPELLANT ROBINSON'S CONVICTION FOR POSSESSION OF CHECKS STOLEN FROM THE MAILS MUST BE REVERSED FOR FAILURE OF PROOF THAT THE CHECKS WERE DEPOSITED IN OR STOLEN FROM THE MAILS [ANSWERING RESPONDENT'S BRIEF, POINT I].

In appellant's main brief, it is argued that the evidence was insufficient to prove that the checks involved in counts 3, 5, 7, 11, 13, 15, and 17 were mailed or stolen from the mails, since the only proof arguably concerning the mailing of the treasury checks was the testimony of one

payee and a similar stipulation that the payee normally received social security checks through the mail, that she did not receive the particular check, and that the endorsement on the check was not hers (195). Thus, there was neither any evidence from the Treasury department indicating that the checks were mailed nor evidence of the manner of the theft itself by which mailing could be inferred. The Government argues, based upon United States v. Dobson, 512 F.2d 615 (6th Cir. 1975), that mere testimony of non-receipt is sufficient, and seeks to find additional evidence probative on the question of whether the checks were stolen from the mails. Neither argument withstands analysis.

Respondent's reliance upon United States v. Dobson, supra, is misplaced. In Dobson, a panel of the Sixth Circuit, without any further elaboration, found sufficient evidence of possession, forgery, and cashing of stolen checks (18 U.S.C. §§1708 and 495) from, inter alia, a stipulation that the checks were stolen and testimony of the payees that they did not know Dobson. The opinion does not mention mailing; it does not even hint that Dobson's challenge to the sufficiency of the evidence was based upon failure of proof of mailing; and there is no indication that the payees' testimony and stipulations were the only evidence relevant to the question of mailing. There is no warrant for concluding that Dobson ever considered the issue of

sufficiency of evidence to prove mailing, let alone held that proof of non-receipt by the payee and a stipulation that the checks were stolen was sufficient proof that the checks were introduced into the mails in the first place. Moreover, the evidence actually discussed in Dobson at least included an explicit stipulation that the checks in question were stolen. Contrary to the Government's position, there was no such stipulation here, but merely an agreement that the checks had not been received by the payees, and that the endorsements were forged.

Apparently recognizing the weakness of the evidence it introduced and relied upon at trial, the Government, for the first time, argues that the obscure notations of the Treasury checks indicating they were issued by disbursement offices outside of New York is additional proof that they were in fact mailed. However, it is clear that this "evidence" was never even considered by the jury. First, the Government made no effort during trial to explain these notations. Thus, the jury could not have known, for example, whether the checks were prepared and mailed from the different disbursement offices or whether they were mailed in bulk to a New York office, where they were processed for distribution and mailing. Moreover, the Government did not mention the notations or their significance in its opening, during summation, or at any other time during the trial. Accordingly, the evidence that the checks originated in out-of-state disbursing offices could not, in this case, have

been considered by the jury as probative of mailing.

The Government also argues that mailing was proved, inter alia, by testimony from Black that one of the purveyors of stolen checks was a postal employee. However, as the Government recognizes, Black did not testify that this individual brought only Treasury checks.

Even more significantly, Black did not testify that this employee brought any of the checks named in the indictment and accordingly, Black's statement is without probative value as applied to the checks in the indictment.

II

THE COURT'S CHARGE ON POSSESSION CONSTITUTED AN IMPERMISSIBLE DIRECTED VERDICT (ANSWERING RESPONDENT'S BRIEF, POINT I).

In a charge on 18 U.S.C. §1708 virtually identical to the one given in United States v. Singleton, 532 F.2d 199 (2d Cir. 1976), Judge Bartels failed to specifically instruct that the jury must find as a separate element that the checks allegedly possessed by appellant were stolen from the mails. Furthermore, on two occasions, Judge Bartels erroneously informed the jury that it was "definitely stipulated" that the checks were stolen. The Court then instructed the jury, on no less than two occasions that, there being no question the checks were stolen, the jury need only consider appellant's knowledge in evaluating guilt or innocence.

The Government argues, in essence, that the above statements were accurate and "fair comment" designed to focus the jury's attention on the "only element that was in real dispute" (Government Brief at 12), rather than an impermissible directed verdict. Both legally and factually, its argument must fail.

It is the jury's duty to decide all issues of fact. United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958). "The plea of not guilty places every issue in doubt, and not even undisputed fact may be removed from the jury's consideration, either by direction or by omission in the

charge." United States v. Natale, 526 F.2d 1160, 1167 (2d Cir. 1975). Thus, even if the Government were correct in its argument that there was no dispute on the questions of theft from the mails and possession, Judge Bartels still had the obligation to focus the jury's attention upon its job to determine those issues. There is simply no question that the Court's charge, taken as a whole, failed in this requirement, and instead presented "too strong an invitation for the jury to neglect the issue[s] entirely." United States v. Singleton, supra, 532 F.2d at 206.

Thus, as in Singleton, the Court began with a charge which failed to specifically enumerate theft from the mails as an element of the offense:

> Now the elements of the offense as charged in these counts of the indictment are one, the unlawful possession of an article such as a check, stolen from the United States mail, and, two, knowledge that the article, such as a check, was stolen from the United States mail.
>
> * * *
>
> The burden is on the Government to prove beyond a reasonable doubt, these two elements, and failure to do so is fatal to the prosecution and entitles the defendant to a verdict of acquittal under these counts.[1]
>
> (590-591)

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1 Moreover, as in Singleton, the failure to set out theft from the mails as a separate element was not ameliorated merely by the Court's reading of the statute. See, United States v. Singleton, supra, 532 F.2d at 205.

After failing to set out the elements of theft from the mails, the Court erroneously stated that it was "stipulated" that the checks were stolen. In fact, as the Government recognizes, the stipulation recited only that the payees normally received the checks, that they did not receive a particular check, and that they did not write the endorsements written thereon. While this information permitted the jury to infer that the checks were stolen, that inference was one for the jury, not the Court, to decide whether to draw. United States v. Hines, supra; see, United States v. Singleton, supra. Accordingly, the Court erred by reciting that it was "definitely stipulated" that the checks were stolen.

Then, this error was infinitely compounded when Judge Bartels, on two occasions, stated that the only issue left to decide was that of knowledge.

> So, the real question is their [sic] knowledge.
>
> (602)

> So, that leaves the question of intent to defraud and the question of knowledge on the part of the defendant Robinson.
>
> (606)

These comments, combined with the Court's reference to the stipulation and its failure to clearly set out the requirement that the jury find theft from the mails could only have led the jury to believe that it did not have to decide that question. Moreover, the Court's comments invited the jury to ignore the issue of possession. These

comments would have constituted plain error even if the questions of theft from the mail and possession were not in dispute. However, such was not the case.

While the Government points out that counsel erroneously conceded that he had agreed that the checks were "stolen," it ignores the more important fact that counsel explicitly stated he was not conceding the issue of theft from the mails:

> MR. MARKS: Stolen from the mails was the stipulation.
>
> MR. COIRO: No, I would then be stipulating the case. I just said stolen.
>
> (546) (Emphasis added)

The Government's assertions to the contrary notwithstanding, the issue of theft from the mails was very much "in dispute." Thus, the Court should have focused the jury's attention on the issue. Of course, the Court's comments had the opposite effect. Accord, United States v. Singleton, supra, 532 F.2d at 207.

Moreover, the Court's comments that only knowledge was at issue were incorrect for the additional reason that appellant had never conceded the issue of possession. Indeed, there was substantial testimony on this issue that was in dispute. Black testified that he collected the checks and brought them to appellant where they were kept in appellant's safe. Appellant, however, testified that Black possessed all the books regarding the account, that Black endorsed and cashed the checks (452-453).

Despite this conflict in the testimony regarding possession, the Government argues that there was no dispute on the issue since the checks were deposited in an account on which appellant was a signatory. The Government's unstated assumption is, of course, that such deposit is conclusive proof that all signatories of the account possess the check. The Government cites no case to support this position, and we are aware of no case which so holds. Since appellant, in fact, contested the issue of possession, the jury was obliged to determine whether the Government had proved it beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

September 13 1976

I certify that a copy of this reply brief ~~and appendix~~ has been mailed to the United States Attorney for the Eastern District of New York.

David L. Goldfarb